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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1953

No. 331

SINCLAIR DAVIS,
E. V. "DOC" SCHULTZ,
LOYD MARTIN PITCH, Being Jointly, Severally and as Representatives of a Class Similarly Situated, ... Appellants,

vs.

CITY OF BOWLING GREEN, KENTUCKY, a Second Class City in the Commonwealth of Kentucky, WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky, Composed of JACK HOLLAND, HENRY CALDWELL, FRED AUSTIN, P. J. DUNAR, C. C. COLEMAN and LEONARD GEDDEUX, Chairman (Sued Individually, as Official Members and as a Political Subdivision), ... Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF KENTUCKY,
CIVIL ACTION No. 468, BOWLING GREEN, KY.

JURISDICTIONAL STATEMENT.

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WESTERFIELD-TRUE CO., INCORPORATED, LOUISVILLE, KY.

STATEMENT OF QUESTION INVOLVED.

The people of Bowling Green, Kentucky were denied the right to vote by referendum on a $10,000,000.00 water-sewer bond issue and debt, which right of vote was guaranteed by Section 157, Kentucky Constitution, when the debt created exceeds the annual income of the city, as in the instant case. The question, therefore, is whether such denial of the right to vote on debt limitation is a violation of the federal civil rights of the appellants and their class; whether it is a violation of the 14th and the 15th Amendment guarantees and whether it is a violation of the Guaranty Clause (Art. 4, Sec. 4) of the United States Constitution?

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IN THE

Supreme Court of the United States

October Term, 1963

No. _____

SINCLAIR DAVIS,
R. V. "BOB" SCHULTZ,
LOYD MARTIN FINCH, Suing Jointly, Severally and as Representatives of a Class Similarly Situated, - - - - *Appellants,*

v.

CITY OF BOWLING GREEN, KENTUCKY, a Second Class City in the Commonwealth of Kentucky,
WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky, Composed of JACK HOLLAND, EMORY CARDWELL, FRED AUSTIN, P. P. DUMAS, C. C. COLEMAN and LEONARD HILDRETH, Chairman (Sued Individually, as Official Members and as a Political Subdivision), - *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF KENTUCKY, CIVIL ACTION No. 933, BOWLING GREEN, KY.

JURISDICTIONAL STATEMENT.

THE OPINION AND JUDGMENT BELOW.

(a) The federal district court below did not deliver an opinion. Its "FINDINGS OF FACTS AND CONCLUSIONS OF LAW", from which appeal is taken, is in the Appendix. There is no official nor unofficial report thereof.

JURISDICTION.

(b) The jurisdiction of the United States Supreme Court is vested and invoked upon the following grounds:

(i) Defendant-appellees (city and the commission) by Ordinance Numbers 766, 775, 776 (filed as original exhibits with the record) enacted a Ten Million ($10,000,000.00) Dollar bonded indebtedness against city property as collateral security and obligated the people to pay therefor by compulsion of penalty for the purpose of improving, replacing, refinancing old debts, facilities and expanding the present water-sewer system in Bowling Green, Kentucky.

The qualified voters of the City of Bowling Green were denied the "*right of election*" and the "*right to vote*" on the Ten Million Dollar bonded indebtedness, which "rights" were secured, protected and "*guaranteed*" to them by *Section 157, Kentucky Constitution*, to-wit.

> "*Sec. 157. Tax Rate; indebtedness; submission of question to Voters—*
>
> ". . . *No* county, *city*, town, taxing district, or other municipality, *shall be authorized* or permitted *to become indebted, in any manner* or for any purpose, *to an amount exceeding the annual income*, in any year, *without the assent of two-thirds of the voters thereof, voting at an election* to be held for that purpose; and any indebtedness contracted in violation of this section shall be *void.*"

The amount of the bonded indebtedness proposed far exceeds the annual income of the city. In fact,

the annual income of the city in 1962 was a fraction over one million dollars; and of course, the bonded indebtedness is Ten Million Dollars.

Defendant-appellees passed said ordinances and the $10,000,000.00 bonded indebtedness by virtue of Kentucky Revised Statutes 58.010 to 58.140 inclusive (set forth in the Appendix), which states that such indebtedness is not an obligation of the people nor the city but the water-sewer commission, an agency of the city, which only mortgages city property as collateral and that the same is not an "indebtedness" as meant in the Constitution of Kentucky.

The ordinances provide compulsory rates and compulsory connections by the property owners with a penalty for failure to do so from $2.00 to $5.00 dollars per day fine and punishment. Payment of the $10,000,000.00 bonded issue is not only a debt and obligation of the people so created by the city ordinance, but so far-reaching that it is a misdemeanor crime.

Appellants seek to enjoin the enforcement of state statutes (K.R.S. 58.010 to 58.140 inclusive) and the said ordinances enacted thereunder and for a declaration of their rights.

In consequence to the denial of the right to vote and the right of election as guaranteed to the appellants, and their class, by the Kentucky Constitution when the debt limit is exceeded, as instigated by the appellees, appellants invoke that it is a violation in turn of their federal rights under and by virtue of the following federal laws, to-wit:

Title 28 U.S.C.A. 2201, "Declaratory Judgments—Creation of Remedy"—

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Title 28 U.S.C.A. 2281, "Injunction against enforcement of State Statute; three-judge court required"—

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title."

Title 28 U.S.C.A. 1343, "Civil Rights and elective franchise"—

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

". . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege

or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

(4) To recover damages or *to secure equitable* or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*"

14th Amendment, Sec. I, United States Contitution—

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

14th Amendment, Sec. V, United States Constitution—

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

15th Amendment, Sec. I, United States Constitution—

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

15th Amendment, Sec. II, United States Constitution—

"The Congress shall have power to enforce this article by appropriate legislation."

Title 42 U.S.C.A. 1981, "Equal Rights under the law"—

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

Title 42 U.S.C.A. 1982, "Property rights of citizens"—

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

Title 42 U.S.C.A. 1983, "Civil Action for Deprivation of Rights"—

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42 U.S.C.A. 1984, "Same; review of proceedings"—

"All cases arising under the provisions of this act in the courts of the United States shall be re-

viewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as provided by law for the review of other causes in said court."

Title 42 U.S.C.A. 1988, "Proceedings in vindication of civil rights"—

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; . . ."

(ii) The judgment sought to be reviewed was dated and entered May 20, 1963; there was no order respecting a rehearing; The "Notice of Appeal" was filed June 5th, 1963 in the United States District Court, Western District of Kentucky, at Bowling Green, Kentucky.

(iii) **Statutory Provisions Believed to Confer on This Court Jurisdiction are:**

Title 28 U.S.C.A. 1253, "Direct Appeals from decisions of three-judge courts"—

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a District Court of three judges."

Title 28 U.S.C.A. Rule 72 (Rules of Civil Procedure), "Appeal from a district court to the Supreme Court"—

"When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken, perfected, and prosecuted pursuant to law and the Rules of the Supreme Court of the United States governing such an appeal."

Appellants appeal to the United States Supreme Court by virtue of 28 U.S.C.A. "Rules", "The revised rules of the Supreme court," Rules 10 to 18 inclusive.

(iv) **Cases and Authority Believed to Sustain the Jurisdiction of the Supreme Court are:**

In *Baker* v. *Carr* (1962), 369 U. S. 186, 82 S. Ct. 691, the city voter became a fractional-voter compared to the rural areas. The reason was legislative inaction to reapportion and action in non-compliance with state constitutional requirements. It was confirmed for decades by reason of the "judicial abnegation", which effect upheld the wrong and resulted in violation of the "equal protection" and a denial of a republican form of government (guaranty clause) to the people.

Analogy is presented that the people of Bowling Green, Kentucky, were "*guaranteed*" the right of election and vote on local debt limitation but denied these rights by state statutes "K.R.S. 58.010 to 58.140 inclusive" and the city ordinances (Nos. 766, 775, 776) enacted thereunder.

The state statute is "state action" *per se* because K.R.S. 58.010(3) provides:

> "Governmental Agency" means the Commonwealth of Kentucky as such acting by or through any department, instrumentality or agency thereof, or any county, city, agency or instrumentality or other political subdivision of the Commonwealth, or agency, or instrumentality thereof."

The "right to vote" and the "right of election" in Kentucky state and local affairs are integral parts of the local system of a Republic in Kentucky. The federal forefathers declared in the United States Constitution a "guaranty clause" (Article 4, Section 4) which reads, "The United States shall guarantee to every state in this Union a republican form of government."

In obedience and in concert with the federal constitutional mandate, the Kentucky constitutional forefathers "guaranteed" the "right to vote" and the "right of election" on local debt limitation by enacting Section 157, Kentucky Constitution, which provides that no city "in any manner" can create debts beyond its annual income without a vote of the people. Thus, this "right to vote" on debt limitation is a component part of our system of a state Republic. It was secured to protect the people from "unlimited debt", just as much as they were protected by the Kentucky Bill of Rights to have freedom of worship, speech and assembly. In fact, Section 157 is the Kentucky Bill of

Rights to protect the free people from unlimited debt without their consent. And it is just as important to have the right to vote upon debt limitation, as it is to vote for officials.

The power of debt is the power to ruin. The state constitutional forefathers made the restraint against "unlimited debt" without a vote of the people a part of our way of life, our system as a republic; because, as history proves, we were but the composite of refugees from debtor prisons in Europe—there was a historic fear of the curse of debt—such as the Roman law provided death for the failure to pay debts or exile beyond the Tiber.

The state legislative circumvention or devise to avoid the Kentucky constitutional guarantee to the people from unlimited local debt is contained in these words:

> *KRS 58.040—*
>
> ". . . The bonds shall be payable solely from the revenue derived from the public project and shall not constitute an indebtedness of the state, county, city or political subdivision within the meaning of the Constitution. It shall be plainly stated on the face of each bond that it has been issued under the provisions of KRS 58.010 to 58.140 and that it does not constitute an indebtedness of the governmental agency within the meaning of the Constitution."

Criminal compulsion to pay the debt by the people is contained in the following provision thereof:

Ordinance No. 776, Section 5:

"Any person . . . violating any of the provisions of the ordinance, or failing or refusing to comply with same, whether or not he, she or it shall be the owner or the occupant of the property involved, shall be *fined* not less than two dollars ($2.00) nor more than five ($5.00) with court costs for each offense. *Each day* that such person, firm, partnership or corporation fails or refuses to connect the sewage from any property owned or occupied by him, her or it, with the combined and consolidated municipal waterworks and sewer system shall constitute a separate offense and shall be subject to the *penalty* herein prescribed for each offense."

The Ordinance creating the debt is simply not a debt created free of the obligation of the people to pay. But to the contrary, it far-reaches into such an obligation of the people that compulsory penalties and fines are imposed for failure of the people to "connect" to the system or failure to pay the rates. The "legislative devise" which circumvents the constitutional guarantee is not just a revenue statute or a debt created to be paid if the enterprise is successful with pledged public property as security or collateral; but rather it has such propensities of force in payment that it is a crime of the people not to pay the debt created by the legislative devise!

Appellants insert the theory of *Monroe* v. *Pape* (1961), 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 492, as applicable also in this matter.

Since 1926 the State Court of Appeals of Kentucky has, under state law, upheld the validity of KRS 58.010 to 58.140 as not being violative of the Kentucky Constitution Sections 157 and 158; see *Dunn* v. *City of Murray*, 208 S. W. 2d 309; *McKinney* v. *Owensboro*, 203 S. W. 2d 24; *Bowling Green* v. *Kirby*, 295 S. W. 1004, 220 Ky. 839. In all state cases, the federal question imposed herein was never alleged nor commented upon.

(v) **Validity of State Statute Involved.**

Appellants seek to enjoin the enforcement of Kentucky Revised Statutes 58.010 to 58.140 inclusive as being legislative devise to circumscribe the federal and state constitutional guarantees of the right to vote by the citizenry on debt limitations.

(vi) **Questions Presented by This Appeal.**

Where the Kentucky Constitution, Section 157, clearly "guarantees" the right to vote and the right of election to the people on the creation of debts by the city or its political subdivision, which exceed the annual income of the city, as in the instant case, and state statute (KRS 58.010 to 58.140 inclusive) permits a city or its political subdivision to exceed the limit without a vote of the people by pledging public property as collateral, the bonds payable only from the revenue received from the enterprise, *i. e.*, the water-sewer rates and charges, and the people are compelled by compulsion of fine and punishment to pay both the connection

fees and the monthly rates so charged, is this violative of appellants, and their class, federal civil rights by such "*legislative devise*" which avoids the right to vote so guaranteed?

Is such legislative devise and the ordinances enacted thereunder, which avoid the right to vote, a violation of *Title 28 U.S.C.A. 1343, Sections 3 and 4, Title 42 U.S.C.A. 1981, 1982, 1983, 1984, 1988;* and the *14th Amendment* ("due process", "equal protection" and "privileges and immunities") *Section 1 thereof;* and is such action violative of the *15th Amendment, Section 1* and further, is such denial of the right to vote, which is an integral part of our Kentucky republican form of government, in turn, a violation too of the federal constitutional mandate (Article 4, Section 4, United States Constitution) which assures that each republican form of government in the various states of the Union shall be protected, secured and guarded?

Is it violative of such civil rights and federal and state constitutional protections when the state highest court by "judicial abnegation" destroys the right to vote? Appellants say that the "right to vote" when once granted and guaranteed by both constitutions, the federal and state, it must always supersede the "police power" of a state if we are to remain a democracy. It is when the "police power" supersedes the "right to vote" that dictatorship prevails, as in Cuba and Russia.

Next, subsequent to the judgment of the three-judge constituted Court below, a suit was filed in state court by *Ada Parsley* v. *The City of Bowling Green*

involving the same subject matter, wherein the appellants intervened. Judgment is adverse to appellants herein. Copy of the state judgment is in the Appendix. It is contended and a question for decision by the Supreme Court that if the appellants' rights of vote and election have been so deprived, then the appropriate writs or remedies should be issued by the Supreme Court to enjoin the state officials from enforcing said state court judgment. *Shelley* v. *Kraemer,* 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948); *Hurd* v. *Hodge,* 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187 (1948).

SUBSTANTIAL QUESTION INVOLVED.

The issue in this case is of great national importance, one which will determine to a certain degree the future local municipal bond market. This case involves a large sum itself, *i. e.,* $10,000,000.00; but that is little compared to the daily amounts of municipal bonds being floated throughout the nation, wherein, they probably have been tested with "friendly test" suits for validity, none have encompassed the question of civil rights herein alleged in regard to a bond issue. The appellants say the questions presented are substantial and bona fide; that it was an abuse of discretion for the lower court to confirm the denial of the right to vote secured to the appellants, and their class, by both the State and Federal constitutions and that unless this case is decided and determined upon its merits, the entire local municipal bond market nation-

wide will be affected in the future by virtue of the "doubt" as to their validity concerning federal questions and further, because state courts are without the power to bind federal courts on questions involving the violation of civil rights secured under Acts of Congress and the United States Constitution; and that it is, in fact, imperative upon the Supreme Court to decide and determine this case upon its merits and to write an opinion as to its decision in order to clarify the contentions. The issue in this case has never been determined. And because of the national importance of the effect of the issuance of local municipal bonds daily throughout the country on the economy of the country, the Supreme Court should allow the presentation of Briefs and have Oral Argument and note jurisdiction of this case.

Further, many state constitutions, as does the Kentucky Constitution, provide that illegal and unlawful acts thereunder cannot later be ratified, assumed nor made legal by subsequent legislation; therefore, the opinion and decision of the Supreme Court in this case is of such magnitude that it might affect the validity of BILLIONS BEYOND BILLIONS of municipal local bonds previously sold and issued.

Wherefore, appellants plead the Supreme Court to reverse the judgment of the Court below, and give direction to sustain the "Findings of Fact and Conclusions of Law" presented by the appellants, and that judgment be so entered declaring said ordinances unconstitutional and violative of the rights of appellants

and with appropriate Writs of Prohibition against state officials from enforcing the provisions of the state court judgment referred to.

Respectfully submitted,

SINCLAIR DAVIS,
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One of the Appellants.

Of Counsel:

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Louisville, Kentucky,

MARION VANCE,
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Glasgow, Kentucky.

Proof of Service.

Sinclair Davis, one of the appellants, certifies that on July 26th, 1963 he served the foregoing Jurisdictional Statement by mailing a copy through the United States Mails, postage prepaid, to the respective defendants and counsel of record, to-wit: (1) On the City of Bowling Green, Kentucky to Hon. G. D. Milligan, City Solicitor and Attorney for said city, and its Mayor, Hon. Bob Graham at Bowling Green, Kentucky; (2) On the Water-Sewer and Sanitation Commission by copy to its members individually and its Attorney of record, Hon. Chas. Reynolds, all at Bowling Green, Kentucky; (3) on the Commonwealth of Kentucky by copy unto Hon. Bert Combs, Governor and Hon. John Breckinridge, Attorney General, thereof at Frankfort, Kentucky. This affidavit is made pursuant to Rule 33 (3) (c), Rules of the Supreme Court of the United States.

Sinclair Davis

SINCLAIR DAVIS,
One of the Appellants.

Subscribed and sworn to before me this July 26th, 1963 by Sinclair Davis to be true and correct.

C. L. Bell

Notary Public, State at Large, (Kentucky)
Com. exp's: June 7th 1965

(Seal)

APPENDIX ONE.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Bowling Green Civil Action No. 933

Sinclair Davis, Et Al., - - - - Plaintiffs,

v.

Water-Sewer and Sanitation,
Commission or Commissioners
of Bowling Green, Kentucky, Etc., - - Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

This case having been submitted on defendants' motion to dismiss on the pleadings, exhibits, oral stipulation of counsel and argument of counsel, the court hereby adopts the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. The plaintiffs are citizens, residents, voters, taxpayers, and consumers of services of the water and sewer utilities of Bowling Green, Kentucky.

Stipulation of Counsel.

II. The General Council, the legislative body of the City of Bowling Green, enacted Ordinances Nos. *775, 776 and 766* for the purpose of defraying the cost of the construction of a public project; to-wit, the expansion of the sewer system, sewer treatment plant, water system and water pumping stations.

Stipulation of Counsel Exhibits.

III. In order to finance the above public project, revenue bonds were to be issued and sold which bonds were to be retired from revenue derived from the sale of utility services to be rendered by the municipality.

Exhibits.

IV. These bonds were revenue producing bonds as authorized by Chapter 58 of Kentucky Revised Statutes.

Chapter 58, Kentucky Revised Statutes.
Exhibits.

V. The authorization for the issuance and proposed sale of these bonds was not submitted for determination by a vote of the people.

Stipulation of counsel.

VI. The sole issue of the case is whether the issuance of revenue producing bonds under the provisions of Chapter 58 of Kentucky Revised Statutes is violative of the provisions of Sections 157 and 158 of the Kentucky Constitution and the provisions of the United States Constitution, specifically amendments V, XIV and XV of the United States Constitution.

Stipulation of counsel.

CONCLUSIONS OF LAW

I. The issuance of revenue producing bonds under Chapter 58 of Kentucky Revised Statutes is not violative of the provisions of Sections 157 and 158 of the Kentucky Constitution.

Dunn et al v. City of Murray, 208 S. W. 2d 309, 306 Ky. 426.

McKinney v. City of Owensboro, 203 S. W. 2d 24, 305 Ky. 253.

City of Bowling Green v. Kirby, 295 S. W. 1004, 220 Ky. 839.

Francis v. City of Bowling Green, 82 S. W. 2d 804, 259 Ky. 525.

Veail v. City of Louisville and Jefferson County Metropolitan Sewer District, 197 S. W. 2d 413.
Perkins v. City of Frankfort, 276 S. W. 2d 449.
Skidmore v. City of Elizabethtown, 291 S. W. 2d 3.
Klein v. City of Louisville, 6 S. W. 2d 1104.
Grimm v. Maloney, 358 S. W. 2d 496.
Burkholder v. City of Louisville, 276 S. W. 2d 29.
Hill v. City of Providence, 211 S. W. 2d. 846.
Walker v. City of Maysville, 220 S. W. 2d 92.
City of Hazard v. Salyers, 224 S. W. 2d 420.
Williams v. City of Barbourville, 246 S. W. 2d 591.

II. The ordinances authorizing the issuance and sale of the revenue bonds are not arbitrary or discriminatory and are a valid exercise of the police power of the City of Bowling Green in the protection of the welfare and health of its citizens.

City of Bowling Green v. Kirby, 295 S. W. 1004.
Francis v. City of Bowling Green, 82 S. W. 2d 804.

III. The privilege to vote on state or local issues is within the jurisdiction of the state, to be exercised as the state may direct and upon such terms as it may deem proper, provided that the laws relating thereto are not unreasonable or arbitrary and there is no discrimination between individuals, and provided the privilege is not refused on account of race, color or previous conditions of servitude.

Pope v. Williams and Harper, 24 Sup. Ct. 573, 48 L. Ed. 817.

Morey v. Doud, 77 Sup. Ct. 1344.

IV. Rates fixed by the municipality for services rendered by a municipally owned utility does not deprive the user of property of his rights under the law, nor it is a taking without due process of law, but is a matter of public policy for the legislature since the property owner re-

ceives a special benefit from the construction of the sewer, water lines and plants in the privilege of making use of them.

Carson v. Sewer Commission of Brocton, 182 U. S. 398, 21 Sup. Ct. 860.

V. Chapter 58 of Kentucky Revised Statutes is not violative of the provisions of amendments V, XIV and XV of the United States Constitution.

Citations Supra.

VI. The issuance and sale of the revenue bonds by the City of Bowling Green for the construction of sewer system and water system expansions, the construction of sewer treatment plant and pumping stations without a vote of the people is valid, reasonable and nondiscriminatory, and a proper exercise of the police power of the city within the provisions of the constitution of the United States and the State of Kentucky.

Citations Supra.

JUDGMENT.

It is ordered and adjudged that defendants' motion to dismiss be sustained and plaintiffs' complaint is hereby dismissed at plaintiffs cost.

(s) Hon. Shackelford Miller, Jr.,
United States Circuit Judge,
Sitting by Designation.

(s) Hon. Mac Swinford,
United States District Judge.

(s) Hon. Henry L. Brooks,
United States District Judge.

APPENDIX TWO.

Kentucky Revised Statutes (K.R.S.) Sections 58.010 to 58.140 Inclusive.

K.R.S. 58.010 Definitions.

"As used in KRS 58.010 to 58.140, unless the context requires otherwise:

(1) 'Public Project' means any lands, buildings, or structures, works or facilities suitable for and intended for use as public property for public purposes or suitable for and intended for use in the promotion of the public health, public welfare or the conservation of natural resources, including the planning of any such lands, buildings, structures, works or facilities, and shall also include existing lands, buildings, structures, works and facilities, as well as improvements or additions to any such lands, buildings, structures, works or facilities." (1958 c 150. Eff. 6-19-58. 1946 c 126 Sec. 1.)

(2) 'Public Project' as defined herein shall include projects intended for use as public property for public purposes by another governmental agency, including the United States Government, other than the governmental agency acquiring the land or constructing the building, structure or facility. (1958 c 150. Eff. 6-19-58).

(3) 'Governmental Agency' means the Commonwealth of Kentucky as such acting by or through any department, instrumentality or agency thereof, or any county, city, agency or instrumentality or other political subdivision of the Commonwealth, or agency, or instrumentality thereof." (1958 c 150. Eff. 6-19-58. 1946 c 126, Sec. 1.)

K.R.S. 58.020 Power of governmental agency to acquire or develop public project and issue revenue bonds.

"A governmental agency acting separately or jointly with one or more of any such agency, may acquire, con-

struct, maintain, add to and improve any public project as defined in KRS 58.010, which public project may be located within or without or partly within and partly without the territorial limits of such governmental agency or agencies and for the purpose of defraying the cost thereof may borrow money and issue negotiable revenue bonds. Before any department or agency of the state government shall borrow money and issue bonds under KRS 58.010 to 58.140, the head of the department or agency shall file with the Secretary of State a written order, approved by the Governor, the Attorney-General and the Commissioner of Finance, setting forth the proposed public project, the amount of the bonds to be issued, and the maximum rate of interest the bonds are to bear. Any governmental agency other than agencies of the state government may borrow money and issue revenue bonds under KRS 58.010 to 58.140 pursuant to an order, resolution or ordinance of its legislative or administrative body, which order, resolution or ordinance shall set forth the proposed public project, the amount of the revenue bonds to be issued and the maximum rate of interest. In every instance the order, resolution or ordinance shall provide that the public project is being undertaken under the provisions of KRS 58.010 to 58.140." (1946, c 126, section 2). (1948 c 226. Eff. 6-17-48).

K.R.S. 58.030 Interest rate and maturity of bonds; leasing of project; acceptance of donations and government aid.

"(1) The bonds may be issued to bear interest at the rate not to exceed six percent per annum, payable either annually or semiannually, and shall be executed in such manner and be payable at such times not exceeding forty years from date thereof and at such place or places as the governmental agency determines. (1948 c 226. Eff. 6-17-48. 1946 c 126 Sec. 3.)

"(2) The bonds may provide that they or any of them may be called for redemption prior to maturity or in-

terest payment dates not earlier than one year from the date of issuance of the bonds, at a price not exceeding 103 and accrued interest, under conditions fixed by the governmental agency before issuing the bonds. (1948 c. 226. Eff. 6-17-48. 1946 c 126 Sec. 3).

"(3) Any governmental agency is authorized to rent or lease such public project or any portion thereof to any persons, partnerships, associations or corporations either public or private. (1948 c 226. Eff. 6-17-48. 1946 c 126, Sec. 3).

"(4) A governmental agency is hereby empowered to accept donations or gifts to the public project from any source and to accept appropriations and grants to the public project from the Federal Government or any agency thereof and appropriations from the state or any county, city or other political subdivision and, at the option of the governmental agency, to pledge such donations, gifts or appropriations to the payment of revenue bonds issued to finance the cost of a public project." (1946 c 126 section 3.) (1948 c 226. Eff. 6-17-48.)

K.R.S. 58.040 Bonds negotiable and tax free; method of sale; interest yield; payable solely from revenue.

"Bonds issued pursuant to KRS 58.010 to 58.140 shall be negotiable and shall not be subject to taxation. If any officer whose signature or countersignature appears on the bonds or coupons ceases to be such officer before delivery of the bonds, his signature or countersignature shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until delivery. The bonds shall be sold in such manner and upon such terms as the governmental agency deems best, or any contract for the acquisition of a public project may provide that payment shall be made in such bonds. In no event shall any bonds be negotiated on a basis to yield more than six percent, except as provided in subsection (2) of KRS 58.030. *The bonds shall*

be payable solely from the revenue derived from the public project and shall not constitute an indebtedness of the state, county, city or political subdivision within the meaning of the Constitution. It shall be plainly stated on the face of each bond that it has been issued under the provisions of KRS 58.010 to 58.140 and that it does not constitute an indebtedness of the governmental agency within the meaning of the Constitution." (1946 c 126, Sec. 4. Eff. June 19, 1946).

(above emphasis is 'ours').

K.R.S. 58.050 Application of proceeds of bonds.

"All money received from the bonds shall be applied solely for the acquisition, construction, maintenance or improvement of the public project, and the necessary expense of preparing printing and selling said bonds, or to advance the payment of the interest on the bonds during the first three years following the date of the bonds." (1946 c 126, Sec. 5. Eff. June 19, 1946).

K.R.S. 58.060 Receiver. "If there is any default in the payment of principal or interest of any bond, any court having jurisdiction of the action may appoint a receiver to administer the public project on behalf of the governmental agency, with power to charge and collect rents, royalties, fees, rates and charges and to receive any other available revenue sufficient to provide for the payment of any bonds or obligations outstanding against the public project, and for the payment of operating expenses, and to apply the income and revenue in conformity with KRS 58.010 to 58.140 and the order, resolution or ordinance referred to in 58.020." (1946 c 126, Sec. 6. Eff. June 19, 1946).

K.R.S. 58.070 Maintenance, operating and depreciation funds; rentals, rates and charges.

"At or before the issuance of bonds the governmental agency shall, by order, resolution or ordinance, set aside

and pledge the income and revenue of the public project including rents, royalties, fees and proceeds of sales of property and from rates and charges for services derived from or rendered by the public project into a separate and special fund to be used and applied in payment of the cost thereof and in the maintenance, operation and depreciation thereof. The order, resolution or ordinance shall definitely fix and determine the amount of revenue necessary to be set apart and applied to the payment of principal and interest of the bonds, and the properties of the balance of the income and revenue to be set aside as a proper and adequate depreciation account, and the remaining proportion of such balance shall be set aside for the reasonable and proper operation and maintenance of the public project. The rents, royalties, fees, rates and charges for the services or sale of the public project shall be fixed and revised from time to time so as to be sufficient to provide for payment of interest upon all bonds and to create a sinking fund to pay the principal thereof when due, and to provide for the operation and maintenance of the public project and an adequate depreciation account." (1946 c 126, Sec. 7. Eff. June 19, 1946).

K.R.S. 58.080. Transfer of surplus to depreciation account.

"If a surplus is accumulated in the operating and maintenance funds equal to the cost of maintaining and operating the public projects during the remainder of the calendar, operating or fiscal year, and during the succeeding like year, any excess over such amount may be transferred at any time by the governmental agency to the depreciation account, to be used for improvements, extensions or additions to the public project." (1946 c 126, Sec. 8. Eff. June 19, 1946).

K.R.S. 58.090. Expenditure and investment of depreciation fund.

"The funds accumulating to the depreciation account shall be expended in balancing depreciation in the public project or in making new constructions, extensions or additions thereto. Any such accumulations may be invested as the governmental agency may designate, and if invested the income from such investment shall be carried into the depreciation account." (1946 c 126, Sec. 9. Eff. June 19, 1946).

K.R.S. 58.100. Refunding bonds.

"The governmental agency may issue new bonds to provide funds for the payment of any outstanding bonds, in accordance with the procedure prescribed by KRS 58.010 to 58.140. The new bonds shall be secured to the same extent and shall have the same source of payment as the bonds refunded." (1946 c 126, Sec. 10. Eff. June 19, 1946).

K.R.S. 58.110. Additional Bonds.

"If the governmental agency finds that the bonds authorized will be insufficient to accomplish the purpose desired, additional bonds may be authorized and issued in the same manner."

K.R.S. 58.120 Bonds for extensions and improvements.

"Any governmental agency acquiring and public project pursuant to the provisions of KRS 58.010 to 58.140 may, at the time of issuing the bonds for such acquisition, provide for additional bonds for extensions and permanent improvements to be placed in escrow and to be negotiated from time to time as proceeds for that purpose may be necessary. Bonds placed in escrow shall, when negotiated, have equal standing with bonds of the same issue."

K.R.S. 58.130 Use of General Funds or Revenues for Public Project.

"Any governmental agency may use, for the purpose of acquiring, constructing, maintaining, extending or improving a public project, or for the payment of interest or principal on any revenue bonds issued by the agency pursuant to KRS 58.010 to 58.140, any funds or tax revenues available for general purposes of the agency and not required by law to be devoted to some other purpose."

K.R.S. 58.140 Condemnation.

"In the event a governmental agency is unable to acquire, by purchase or agreement, any real property deemed necessary for the purposes of a public project, such agency may acquire the same by condemnation. The procedure for condemnation shall be as provided in KRS 416.010 to 416.080, or as provided in KRS 416.120, whichever procedure is selected by the agency."

APPENDIX THREE.

No. 5718

Ada Parsley, - - - - - - - Plaintiff,

v.

City of Bowling Green, et al., - - Defendants.

JUDGMENT.

This cause being submitted to the Court on pleadings, proof, argument of counsel and briefs, and the Court being advised, it is ordered and adjudged that plaintiff's complaint, amended complaint and the intervening complaint be dismissed.

APPENDIX

The Court having rendered a written opinion, including Findings of Fact and Conclusions of Law dated June 5, 1963, it is ordered that said Findings of Fact and Conclusion of Law and the Memorandum Opinion of the Court be filed as a part of this record and be made a part of this judgment as though copied in full herein.

It is further ordered that the Findings of Fact, Conclusions of Law and Judgment of the U. S. District Court for the Western District of Kentucky in Civil Action 993, styled Sinclair Davis, et al. v. City of Bowling Green, and Water, Sewer and Sanitation Commission of the City of Bowling Green be filed as part of this record and adopted as part of this judgment as though copied in full herein.

It is further ordered and adjudged that Ordinances #766, 775, and 776 were duly enacted by the General Council of the City of Bowling Green and are valid ordinances, in no way violative of any provision of the Kentucky or Federal Constitutions.

It is further ordered and adjudged that the revenue bonds provided for by the ordinances of the City above referred to are not direct obligations of the City and do not contravene Section 157 or 158 of the Constitution of the State of Kentucky, and are not direct obligations of the municipality, but are obligations based solely on revenues of this public project within the meaning of Chapter 58 of Kentucky Revised Statutes.

It is further ordered and adjudged by the Court that it was not necessary to submit the issuance of these bonds by referendum to a vote of the people.

It is further ordered and adjudged that the rates provided for by the City of Bowling Green for services rendered and to be paid by those who use the public project, which is the subject matter of this action, are not confiscatory or arbitrary, but are within the discretion of the

General Council and are reasonable based upon the facts as shown in the record.

It is further ordered and adjudged that the provisions of said ordinances requiring users of the old sewer system to pay additional fees or compensation for the construction of the new sewer system is not unreasonable or arbitrary, since it is clearly shown by all the proof in this record that the general health and safety of the entire city is directly involved.

It is further ordered and adjudged that the lowest bidder after due advertisement for the construction of the sewer system was the American Contractors, Inc. It further appearing in connection therewith that upon the opening of said bids and upon furnishing all bids to the Chester Engineers for examination and recommendation it was immediately discovered that the American Contractors, Inc. the lowest bidder, had made a mistake in arithmetic, and it is the finding of the Court, based upon all the proof in this record, that said mistake in the bid was honestly made and without fraud or evil purpose, and it is further adjudged that the General Council properly and legally sustained the motion of the low bidder to correct the mistake, and which corrected bid is still the lowest bid of all the bids upon the project.

It is further ordered and adjudged that it is within the discretion and authority of the General Council to permit this correction and if it so desires to finally accept the bid of the American Contractors, Inc. for its corrected amount and to issue the bonds as provided in the above mentioned ordinances.

It is further ordered and adjudged that the motion of the intervenors to stay the proceedings in this case until an appeal can be prosecuted from the judgment of the U. S. District Court is hereby overruled.

The defendants may recover their costs of the plaintiff and the intervening plaintiffs.

This June 5, 1963.

(s) Jno. B. Rodes,
Judge, Warren Circuit Court.

State of Kentucky }
County of Warren }

I, John P. Hanes, Clerk Warren Circuit Court, do hereby certify that the foregoing is a true and correct copy of the final Judgement in the above styled cause as appears of record in my office.

This July 19, 1963.

(s) John P. Hanes, Clerk,
Warren Circuit Court.

(Seal)

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IN THE

Supreme Court Of The United States

October Term, 1963

No. 331

SINCLAIR DAVIS,
R. V. "BOB" SCHULTZ,
LOYD MARTIN FINCH, Suing Jointly, Severally and as Representatives of a Class Similarly Situated, ... Appellants,

versus

CITY OF BOWLING GREEN, KENTUCKY, a Second Class City in the Commonwealth of Kentucky,
WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky, Composed of JACK HOLLAND, EMORY CARDWELL, FRED AUSTIN, P. P. DUMAS, C. C. COLEMAN and LEONARD HILDRETH, Chairman (Sued Individually, as Official Members and as a Political Subdivision), ... Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF KENTUCKY,
CIVIL ACTION No. 933, BOWLING GREEN, KY.

MOTION TO AFFIRM JUDGMENT

SQUIRE R. OGDEN
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CHARLES H. REYNOLDS
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Bowling Green, Kentucky

Attorneys for Appellees

IN THE

Supreme Court Of The United States

October Term, 1963

No. _____

SINCLAIR DAVIS,
R. V. "BOB" SCHULTZ,
LOYD MARTIN FINCH, Suing Jointly, Severally and as Representatives of a Class Similarly Situated, ... Appellants,

versus

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WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky, Composed of JACK HOLLAND, EMORY CARDWELL, FRED AUSTIN, P. P. DUMAS, C. C. COLEMAN and LEONARD HILDRETH, Chairman (Sued Individually, as Official Members and as a Political Subdivision), ... Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF KENTUCKY,
CIVIL ACTION No. 933, BOWLING GREEN, KY.

MOTION TO AFFIRM JUDGMENT

Appellees move the Court to affirm the judgment of the United States District Court for the Western District of Kentucky on the grounds that,

a. No Federal question is involved, and

b. It is manifest that the question on which the decision of this cause depends is so unsubstantial as not to need further argument. Rule 16.

SQUIRE R. OGDEN
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Louisville, Kentucky

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Attorneys for Appellees

PROOF OF SERVICE.

For appellees, Squire R. Ogden, of counsel, certifies that on the _____ day of August, 1963 he served the foregoing Motion to Affirm Judgment by mailing a copy in the United States Mails, postage prepaid, to the respective appellants and counsel of record, to-wit: (1) Sinclair Davis, 1148 High Street, Bowling Green, Kentucky, R. V. "Bob" Schultz, 807 Fairview, Bowling Green, Kentucky, and Loyd Martin Finch, 278 Longview Drive, Bowling Green, Kentucky; (2) and their attorneys, Hon. John Ward, Danville, Kentucky, Hon. Leland Logan, Myers Building, Bowling Green, Kentucky, Hon. A. O. Scafuro, 2 West Allendale Avenue, Allendale, New Jersey, Hon. C. L. Bell, 601 Center Building, Louisville, Kentucky and Hon. Marion Vance, 103 East Main Street, Glasgow, Kentucky. Certificate of service is made pursuant to Rule 33 (3) (b), Rules of the Supreme Court of the United States.

_____

SQUIRE R. OGDEN

Subscribed and sworn to before me this _____ day of August, 1963, by Squire R. Ogden, of counsel for appellees, to be true and correct.

_____

Notary Public, Jefferson Co., Ky.

My Comm. expires _____ day of _____,

19___.

(Seal)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963.

No. 331

SINCLAIR DAVIS,
R. V. "BOB" SCHULTZ,
LOYD MARTIN FINCH, Suing Jointly, Severally and as Representatives of a Class Similarly Situated, - - - - - - - - Appellants,

versus

CITY OF BOWLING GREEN, KENTUCKY, a Second Class City of the Commonwealth of Kentucky,
WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky, composed of Jack Holland, Emery Cardwell, Fred Austin, P. P. Durnal, O. C. Coleman, and Leonard Hildreth, Chairman (Sued Individually as Official Members and as a Political Subdivision) - Appellees.

BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF KENTUCKY,
CIVIL ACTION No. 922, BOWLING GREEN, KENTUCKY.

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WESTERN-GROTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term 1963.

No. _____

SINCLAIR DAVIS,
R. V. "BOB" SCHULTZ,
LOYD MARTIN FINCH,
Suing Jointly, Severally and as Representatives of a Class Similarly Situated. - - - - - *Appellants.*

v.

CITY OF BOWLING GREEN, KENTUCKY, A Second Class City of the Commonwealth of Kentucky.
WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky composed of Jack Holland, Emory Cardwell, Fred Austin, P. P. Dumas, C. C. Coleman, and Leonard Hildreth, Chairman (Sued individually as official members and as a Political Subdivision) - - *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF KENTUCKY, CIVIL ACTION No. 933, BOWLING GREEN, KENTUCKY.

BRIEF IN SUPPORT OF MOTION TO AFFIRM JUDGMENT.

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MATTHEW BENDER & COMPANY
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May it please the Court:

I.

STATEMENT OF SUBJECT MATTER.

This is an action, filed in the United States District Court for the Western District of Kentucky seeking to enjoin the City of Bowling Green, Kentucky and the Water, Sewer and Sanitation Commission from issuing and selling bonds for the construction of a sewer system, sewer treatment plant, water system and water pumping station expansion projects on the ground that failure to submit the issue to a vote constituted a violation of appellant's civil rights.

This cause is now before the Supreme Court of the United States on an appeal from a judgment of the United States District Court for the Western District of Kentucky, sitting as a three judge panel, dismissing the complaint.

Appellees have filed a Motion to Affirm the judgment of the District Court.

II.

STATEMENT OF THE CASE.

The General Council, the legislative body of the City of Bowling Green, Kentucky, enacted ordinances authorizing the issuance and sale of $10,000,000.00 in bonds for the purpose of defraying the cost of construction and expansion of a sewer system, sewer treatment plant, water system and water pumping stations.

These bonds, under the specific terms of the ordinances, did not constitute an indebtedness of the City of Bowling Green, Kentucky, but were to be retired solely from revenue derived from the sale of utility services to be rendered by the municipality, and were authorized by Chapter 58 of the Kentucky Revised Statutes.

Complaint and ordinances filed as exhibits. See Item 2 of record.

The authorization for the issuance and proposed sale of these bonds was not submitted for determination by a vote of the people.

Stipulation of counsel.

III.

STATEMENT OF QUESTION INVOLVED.

Did the Legislative bodies of the City of Bowling Green, Kentucky, violate the civil rights of the appellants by enacting an Ordinance for the issuance and sale of revenue producing bonds for the purpose of financing the construction and expansion of a sewer system, treatment plant, water system and pumping stations without, first, submitting the matter to the registered voters of the City of Bowling Green.

IV.

ARGUMENT.

1.

No Federal Question Involved.

The face of the pleadings, exhibits, record, Notice of Appeal and Jurisdictional Statement show that no federal question is involved.

The appellants seek to invoke federal jurisdiction upon the erroneous assumption that the facts herein constitute a violation of appellant's civil rights.

The statutes upon which appellants rely as set forth in the Jurisdictional Statement, pages four to seven, have no application to the facts of this case.

Appellants cite Section 157 of the Constitution of Kentucky as the authority upon which they rely in this case. This section has been interpreted by the Court of Appeals of Kentucky in numerous cases, cited hereinafter, as not requiring a vote of the people for the issuance of revenue producing bonds under the provisions of Chapter 58 of Kentucky Revised Statutes for the reason that the bonds, which are to be retired from revenue solely derived from the sale of utility services to be rendered by the municipality, do not create an "indebtedness" within the meaning of Section 157 of the Constitution of Kentucky.

Appellants rely upon Section 1 of the Fourteenth Amendment.

The City of Bowling Green, Kentucky, in providing for the issuance of bonds to finance the above men-

tioned public project is proceeding by due process of the law as provided in Chapter 58 of Kentucky Revised Statutes, which has been held constitutional by the Court of Appeals of Kentucky, and is applying the ordinances equally and without discrimination among all of its citizens, thus granting equal protection of the laws to all.

The Fourteenth Amendment of the Constitution of the United States has been interpreted on many occasion by the Supreme Court. Its provisions relate only to "invidious discrimination."

In the case of Morey v. Doud, 77 Supreme Court 1344, the Supreme Court of the United States held that "the prohibition of the Equal Protection Clause goes no further than the invidious discrimination." In this case the Court summarized the rule.

Appellants cite Section 1 and Section 5, Fourteenth Amendment of the United States Constitution. We fail to see the application to this case.

Nothing can be found in the subject ordinances or State Statute, which attempts to deny anyone the right to vote "on account of race, color or previous condition of servitude".

If appellants can invoke Federal jurisdiction by simply alleging violation of civil rights, without showing discrimination, then there is no case which could not be brought into Federal Court by such procedure. Under the law, as we understand it, there must be a showing of "invidious discrimination" between persons before Federal jurisdiction can be invoked under

the Fourteenth and Fifteenth Amendments to the United States Constitution and under the laws relating to civil rights.

Appellants cite the case of Baker v. Carr, (1962) 369 U. S. 186, 82 Sup. Ct. 691, in support of their contention that this question involves a Federal issue.

In that case we find that there was an obvious discrimination between the city voter and the rural voter, and the Court held that failure of the State Legislature to fairly and reasonably re-apportion legislative districts to provide equal representation to each voter violated the constitutional rights of the voters of Tennessee. There was, in that case, an "invidious discrimination" between voters.

In the case at bar we find no application of the principles set out in the Baker v. Carr case, *supra*, as there is no discrimination between voters or persons in our case. All are being treated alike.

Appellants cite one other case, the case of Monroe v. Pape, (1961) 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 492. This case relates to a suit against police officers who had been engaged in practices of unreasonable searches and seizures. The plaintiffs invoke the provisions of Title 42, U.S.C.A. Section 1983, just as the appellants sought to invoke it in the case at bar.

The Supreme Court held in that case that a municipal corporation was not a "person" within the meaning of the act.

We quote from the case of Monroe v. Pape, *supra*, as follows:

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within Federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'persons' was used in this particular act to include them."

Thus we reason that the City of Bowling Green is not included within the meaning of the word "person" as used in Title 42 USCA 1983, and that statute therefore has no application to this case.

Further, the case of Monroe v. Pape, *supra,* related to a civil action against Chicago policeman who had engaged in unreasonable searches and seizures. Illinois law had made no provision for civil action in such cases.

The distinction between the case aforesaid and the case at bar is that unreasonable searches and seizures are prohibited under the provisions of the Fourth Amendment of the Constitution of the United States, while in the case at bar the Federal Constitution makes no reference to the right of a resident of the city to vote on the issuance of local revenue producing bonds.

The Supreme Court pointed out in the case of Monroe v. Pape, *supra,* that one of of the prevailing reasons for the passage of Title 42 U.S.C.A. 1983, was to protect against deprivation of the rights of citizens by reason of prejudice, passion, neglect or intolerance. Nothing of that character is apparent in the case at bar.

Further, it has been held in the case of Carson v. Sewer Commission of Brecton, 182 U. S. 398, 21 S. Ct.

860, that the rates fixed by the municipality for services rendered by a municipally owned utility do not deprive the user of property of his rights under the law nor is it a taking without due process of law, but is a matter of public policy for the legislature, since the property owner receives a special benefit from the construction of the sewer in the privilege of making use of it.

The due process of law, and the equal protection of laws as guaranteed in the Fifth, Fourteenth and Fifteenth Amendments of the United States Constitution prohibit discrimination and arbitrary treatment. There is no discrimination or arbitrary treatment involved in the Ordinances and State Statute which are the subject of this action. The statutory and constitutional laws of the State of Kentucky, as interpreted by the Court of Appeals of Kentucky have been fully obeyed and equally applied under all of the definitions of "due process", "equal protection" of the law and "civil rights". The City Ordinances and Chapter 58 of Kentucky Revised Statutes are valid and constitutional under both state and federal laws.

2.

The Constitution of the United States and the Federal Statutes Do Not Require a Vote of the People to Authorize the Issuance and Sale of Revenue Producing Bonds by a Municipality.

We can find no provision of the Federal Constitution which requires a vote of the people in the issuance of bonds by a municipality or which provides for a vote of the people on a local issue.

The case of William H. Pope v. John M. C. Williams and John W. Harper, Officers of Registration, constitute the Board of Registry for the Election District #7 of Montgomery County, Maryland (1904) 24 S. Ct. 573, 48 L. Ed. 817, deals with this subject.

We quote from this case:

> "The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Minor v. Happersett, 21 Wall 162, 22 L. Ed. 627. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the say may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution. The state might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in Minon v. Happersett,

21 Wall 162, 22 L. Ed. 627, such persons were allowed to vote in several of the states upon having declared their intention to become citizens of the United States. Some states permit women to vote; others refuse them that privilege. A state so far as the Federal Constitution is concerned might provide by its own constitution and laws that none but native born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the states alone to prescribe, subject to the conditions of the Federal Constitution already stated, although it may be observed that the right to vote for a member of Congress is not derived exclusively from the state law. See Fed. Const. Art. 1 and 2; Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17. But the elector must be one entitled to vote under the state statute. Id. See also Swafford v. Templeton, 185 U. S. 487, 491, 46 L. Ed. 1005, 1007, 22 Sup. Ct. Rep. 783. In this case no question arises as to the right to vote for electors of President and Vice President, and no decision is made thereon. The question whether the conditions prescribed by the state might be regarded by others as reasonable or unreasonable is not a Federal one. We do not wish to be misunderstood, however, as intimating that the condition in this statute is unreasonable or in any way improper."

The above case was decided before the adoption of the Nineteenth Amendment, which provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account or sex."

No further provisions of the Federal Constitution relate to the right of the state to determine the right of its citizens to vote on local issues.

Thus we see that the Federal Constitution does not require a vote of the people on a bond issue. It is true that the Federal Constitution prohibits discrimination on account of race, color, previous condition of servitude and sex, but the above case holds that the state has the right to determine the requirements of voting except that it cannot violate the above mentioned prohibitions against discrimination. Further it follows that the Courts of each state have the right, within the above limitations, to interpret its own constitution and statutes relating thereto.

In regard to the right of the individual to vote, Section 2004 of the Civil Rights Act of 1957, 42 U.S.C.A. 1971 provides as follows:

> "(a) All citizens of the United States, who are otherwise qualified by law to vote at any election . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage or regulation of any state or territory, or by or under its authority to the contrary notwithstanding."

We have asked appellants' counsel to point out in what way the ordinances and statute involved in this case have violated the civil rights of the appellants with regard to their voting privileges as defined in the Civil Rights Act above set out. In the case at bar there has been no discrimination as to race, color, pre-

vious condition of servitude, or sex. There are no provisions of Federal law which require that appellants be given a right to vote on the issuance of revenue producing bonds for the construction of public projects.

3.

The Ordinances and Statute in Issue Comply With the Provisions of Section 157 of the Kentucky Constitution as Interpreted by the Court of Appeals of Kentucky.

The only issue left for discussion is: Were appellants denied equal protection of laws or due process in the issuance of bonds under the provisions of Section 58.010 to 58.140 of Kentucky Revised Statutes, Appendix Two Jurisdictional Statement and Section 157 of the Kentucky Constitution?

The bonds were issued pursuant to Chapter 58 of Kentucky Revised Statutes which provides that any governmental agency may acquire, constitute, maintain, add to and improve any public project within or without the territorial limits of such governmental agency, and, for the purpose of defraying the cost thereof, may borrow money and issue negotiable revenue producing bonds. It further provides that a city is a "governmental agency" within the meaning of the statute.

The Court of Appeals of Kentucky has held, in all cases raising this issue, that revenue producing bonds issued pursuant to Chapter 58 K.R.S., Appendix Two, Pages 23-29, Jurisdictional Statement do not create an "indebtedness" within the meaning of Section 157 of

the Kentucky Constitution. Among the most recent cases are the following authority:

McKinney v. City of Owensboro, 203 S. W. 2d 24, 305 Ky. 253;

Dunn v. City of Murray, 208 S. W. 2d 309, 306 Ky. 426;

Francis v. City of Bowling Green, 82 S. W. 2d 804, 259 Ky. 525;

Veail v. City of Louisville and Jefferson County Metropolitan Sewer District, 197 S. W. 2d 413;

and the other cases cited in the Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Western District of Kentucky. Pages 19-22 of Appendix One to Jurisdictional Statement.

We respectively point out to the Court that the same subject matter contained in this action was involved in a State action filed in the Warren Circuit Court of Kentucky styled Ada Parsley, Sinclair Davis, et al v. City of Bowling Green, Kentucky. In this action the appellants intervened. A judgment adverse to the appellants was entered. Appendix Three, Jurisdictional Statement, Pages 29-32.

The appellants did not appeal to the Court of last resort in Kentucky, the Court of Appeals, but permitted the judgment of the Warren Circuit Court to stand. Thus, appellants failed to exhaust their state remedies.

We submit that the Court of Appeals of the Commonwealth of Kentucky is the court of last resort to which appellants should have addressed their appeal

from the decision of the Warren Circuit Court inasmuch as the Court of Appeals of Kentucky is the proper forum for the interpretation of the Kentucky Constitution.

Appellants failed to show in what respect the provisions of Section 157 of the Kentucky Constitution, as interpreted by the Court of Appeals of Kentucky, are violative of the provisions of the United States Constitution.

V.

SUMMARY.

The motion to affirm the judgment of the United States District Court for the Western District of Kentucky should be sustained for the following reasons:

1. No Federal question is involved.

2. It is apparent from the complaint filed by the appellants in the District Court and the exhibits attached thereto, which are a part of this record, that no discrimination is involved in this case.

3. While the appellants may invoke the term "Civil Rights", this alone does not bring this case within the jurisdiction of the Court unless the record shows that the ordinances and statute attacked resulted in an "invidious discrimination" on account of race, color, previous condition of servitude or sex. None of these elements appear in this record.

4. Appellants failed to cite, in the Jurisdictional Statement, any statutory or constitutional authority bringing this case within the jurisdiction of this court.

5. The Constitution of the United States and the Federal statutes do not require a vote of the people to authorize the issuance and sale of revenue producing bonds by a municipality.

6. The question as to whether or not there should be a vote to authorize the issuance of revenue producing bonds is purely an issue to be determined by the Courts of Kentucky, which have already upheld the validity and constitutionality of the bonds under their interpretation of the statutes and constitution of the State of Kentucky.

We, therefore, respectfully request the Court to affirm the judgment of the United States District Court for the Western District of Kentucky, under Rule 16 of the Rules of the Supreme Court, on the ground that no federal question is involved and it is manifest that the question on which the decision of this cause depends is so unsubstantial as not to need further argument.

Respectfully submitted,

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PROOF OF SERVICE.

For appellees, Squire Ogden, of counsel, certifies that on the day of August, 1963 he served the foregoing Brief in Support of Motion to Affirm by mailing a copy in the United States Mails, postage prepaid, to the respective appellants and counsel of record, to-wit: (1) Sinclair Davis, 1148 High Street, Bowling Green, Kentucky, R. V. "Bob" Schultz, 807 Fairview, Bowling Green, Kentucky, and Loyd Martin Finch, 278 Longview Drive, Bowling, Green, Kentucky; (2) and their attorneys, Hon. John Ward, Danville, Kentucky, Hon. Leland Logan, Myers Building, Bowling Green, Kentucky, Hon. A. O. Scafuro, 2 West Allendale Avenue, Allendale, New Jersey, Hon. C. L. Bell, 601 Center Building, Louisville, Kentucky and Hon. Marion Vance, 103 East Main Street, Glasgow, Kentucky. Certificate of service is made pursuant to Rule 33 (3) (b), Rules of the Supreme Court of the United States.

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FILED
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

Docket Number 331

SINCLAIR DAVIS,
R. V. "BOB" SCHULTZ,
LOYD MARTIN FINCH, Suing Jointly, Severally and as Representatives of a Class Similarly Situated, - - - - - Appellants,

versus

CITY OF BOWLING GREEN, KENTUCKY, a Second Class City in the Commonwealth of Kentucky,
WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky, Composed of Jack Holland, Emory Cardwell, Fred Austin, P. P. Dumas, C. C. Coleman and Leonard Hildreth, Chairman (Sued Individually, as Official Members and as a Political Subdivision), - - - - - Appellees.

Civil Action No. 933.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY,
AT BOWLING GREEN, KENTUCKY.

APPELLANTS' REPLY AND BRIEF TO APPELLEES' MOTION AND BRIEF.

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HISTORICAL BACKGROUND.

The qualified voters of the City of Bowling Green, Kentucky were *denied* the "*right of election*" and the "*right to vote*" on the Ten Million Dollar Bonded Indebtedness created by City Ordinance, which "*rights*" were secured, protected and "*guaranteed*" to them by *Section 157, Kentucky Constitution,* to-wit:

> "*Sec. 157. Tax Rate; indebtedness; submission of question to Voters—*
>
> ". . . No county, *city,* town, taxing district, or other municipality, *shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding the annual income, in any year, without the assent of two-thirds of the voters thereof, voting at an election* to be held for that purpose; and any indebtedness contracted in violation of this section shall be *void.*"

It is admitted that the Ten Million Dollar bonded indebtedness enacted by Ordinance of the City of Bowling Green, Kentucky for its agency, The Water-Sewer-Sanitation Commission, far exceeds the "annual income of the city" of Bowling Green, Kentucky, which is approximately $1,055,000.00 each year; and further admitted that the people were denied the RIGHT OF ELECTION AND THE RIGHT TO VOTE thereon.

The "*right of election*" and the "*right to Vote*" possessed with the people, in such an instance, by virtue of Section 157 of the Kentucky Constitution, are

integral and component parts of the "Kentucky Republican Form of Government", which our state constitutional forefathers obeyed in concert with the federal mandate contained in Article IV, Section 4, Uinted States Constitution (Guaranty Clause), which reads:

> "The United States Shall *Guarantee* to every *State* in this Union a Republican Form of Government."

The federal mandate in the Guaranty Clause merely meant as each new state came into the Union it could not set up a hierarchy, monarchy, dictatorship or tyranny—it must be a "republican form of government"—with the "power" in the hands of the people, not the select few; nor could any state have set up a "communistic form of government", which then was not specifically known, but yet was excluded.

THE POWER OF DEBT IS DANGEROUS IT IS THE POWER OF SLAVERY.

Debt is a force. It is abstract in its creation, but commands human labor in repayment of the obligation. As the elemental forces have moved matter, the "power of debt" has moved the course of human history. It has been a compelling cause throughout centuries of wars, revolutions, insurrections, revolts in man's struggle for freedom.

In writing these fundamental constitutional liberties, our state and and federal forefathers viewed the 6,000 years of bloody history of man's tyranny over

man, as the experiences to guide their wisdom in selecting the safeguards for our freedom and liberty we cherish today.

Some of their forefathers, or themselves, lived in the *sewers* of France to escape their *debts*. This Nation originally was but the composite of a group of refugees fleeing from the fear of or escape from "Debtor Prisons" in Europe. They knew the cruelty of the guillotine; they saw women imprisoned in the Basties of France, who gave birth to babes either to be eaten by dungeon rats or else never to see the light of day. They saw the exiles of human flesh to work unto death in the galleys of Britain's ships upon its seven tyrannical seas, or in the salt mines of Russia or the torture chambers of the Orient. They knew the history of *feudalism*, where the power was in the hands of a few and how the interest rates were increased, which, in turn, created *serfdom*, when the innocent child was bound to the land to work until the false debt of his deceased parents was repaid. They saw where history proved that the "*power of debt*" could and did create "slavery not only over the living but posterity." Our forefathers knew that until "liberty" could become a reality for the masses the world would continue to be inhabited by those who slave and those who live on slavery.

The Pilgrims who crossed the black waters of the mighty Atlantic to land at Plymouth, realized the "power of debt" and wrote in their creed, The Mayflower Compact, a proviso that each seventh year all debts among themselves were to be cancelled.

Our constitutional scholars knew the POWER OF DEBT was dangerous, and that it must always be guarded with the greatest of fear.

Mr. Jefferson said,

> "I PLACE *ECONOMY* AMONG THE FIRST AND MOST IMPORTANT OF REPUBLICAN *VIRTUES*, AND *PUBLIC DEBT* AS THE GREATEST OF THE DANGERS TO BE FEARED."

From Paris in 1789, *Mr. Jefferson* wrote to *Mr. Madison:*

> "*DEBT IS A CURSE.* WHETHER ONE GENERATION OF MEN HAS A RIGHT TO BIND ANOTHER IS A QUESTION OF SUCH CONSEQUENCE AS NOT ONLY TO MERIT DECISION, *BUT PLACE ALSO, AMONG THE FUNDAMENTAL PRINCIPLES OF EVERY GOVERNMENT.* That no such obligation can be transmitted I think very capable of proof. I set out on this ground which I suppose to be self-evident; THAT THE EARTH BELONGS IN *USUFRUCT to the living*, that the dead have neither right nor power over it.
>
> "The portion occupied by any individual ceases to be his when himself ceases to be and reverts to the society. If the society has formed no rules for the appropriation of its lands in severalty, it will be taken by the first occupants. These will generally be the wife and children of the decedent."

Footnote: The forefathers knew the CRUELTY of the ROMAN LAW in regard to the "*Power of Debt.*"

"After the judicial proof or confession of the debt, thirty days of grace were allowed before a Roman was delivered into

the power of his fellow-citizen. In prison, twelve ounces of rice were his daily food; he might be bound with a chain of fifteen pounds weight; and his misery was thrice exposed in the market-place to solicit the compassion of his friends and countrymen. At the expiration of thirty days, the *debt* was discharged by the LOSS OF LIBERTY OR LIFE; the *insolvent debtor was either put to death or sold in foreign slavery beyond the Tiber.*"

(Quoted From: "*The Decline and Fall of the Roman Empire,*" Vol. 2, Page 1472, by Edward Gibbon, The Heritage Press, New York.)

"If they have formed rules of appropriation, those rules may give it to the wife and children, or to some of them, or to the legatee of the deceased. So they may give it to his creditors. But the child, the legatee or creditor take it, not by any NATURAL RIGHT, BUT BY A LAW OF THE SOCIETY OF WHICH THEY ARE MEMBERS AND TO WHICH THEY ARE SUBJECT. THEN NO MAN CAN BY NATURAL RIGHT OBLIGE THE LANDS HE OCCUPIED, OR THE PERSONS WHO SUCCEED HIM IN THAT OCCUPATION, *TO THE PAYMENT OF DEBTS CONTRACTED BY HIM.* FOR IF HE COULD, HE MIGHT DURING HIS OWN LIFE EAT UP THE *USUFRUCT* OF THE LANDS FOR SEVERAL GENERATIONS TO COME, AND THEN THE LANDS WOULD BELONG TO THE DEAD AND NOT TO THE LIVING WHICH IS THE REVERSE OF THE PRINCIPLE."

"WHAT IS TRUE OF EVERY MEMBER OF THE SOCIETY INDIVIDUALLY, IS TRUE OF THEM ALL COLLECTIVELY, SINCE THE RIGHTS OF THE WHOLE CAN BE NO MORE THAN THE SUM OF THE

RIGHTS OF THE INDIVIDUALS. THEN NO GENERATION CAN CONTRACT *DEBTS* GREATER THAN MAY BE PAID DURING THE COURSE OF ITS OWN EXISTENCE."

Mr. Jefferson said,

"We are ruined, Sir, if we do not overrule the principle that 'The more we owe, the more prosperous we shall be'."

(From Letters written by Thomas Jefferson.)

* * * * *

Gentlemen, some of *Thomas Paine's* statements in "*The Rights of Man*" blend in with the depth of the subject matter, and we quote some briefly:

"Every age and generation must be free to act for itself, in all cases, as the ages and generations which preceded it. This vanity and presumption of governing beyond the grave, is the most ridiculous and insolent of all tyrannies. *Man has no property in man; neither has any generation* which are to follow."

Later, in Mr. Paine's "*Rights of Man*", he wrote:

". . . and consequently that all men are born equal, and with equal natural rights, in the same manner as if posterity had been continued by *creation instead of generation*, the latter being only the mode by which the former is carried forward; *and consequently, every child born into the world must be considered as deriving its existence*

from God. The world is as new to him as it was to the first man that existed, and his natural right in it is of the same kind."

Footnote: u' su fruct—*usufruct*—u'zu-frukt—usufructus (use plus fruit)—*Roman and Civil law*, the right of using and enjoying the fruits or profits of an estate or other thing belonging to another, without impairing the substance. This right is generally treated as a personal servitude and includes both the use and the enjoyment of the fruits. Also, by extension, a similar right or allowed in things consumed in the using."

TOM PAINE'S DEFINITION OF A CONSTITUTION.

"*A constitution is not a thing in name only, but in fact.* It has not an ideal, but a *real existence;* and wherever it cannot be produced in a visible form, there is none. *A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of government,* but OF THE PEOPLE constituting a government. It is the *body of elements,* to which you can refer, *and quote article by article;* and *contains the principles of which the government shall be established,* the form in which it shall be organized, the powers it shall have, the *mode of elections,* the duration of parliaments, or by whatever name such bodies may be called; the powers which the executive part of the government shall have; and, in fine, every thing that relates to the complete organization of a civil government, and the principle on which it shall act, and by which it shall be bound. A constitution, therefore, is to a government, what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make

laws, neither can it alter them; it only acts in conformity to the laws made; and the government is in like manner governed by the constitution."

* * * * *

Mr. Paine said at another time,

"On the contrary, government in a well-constituted republic, requires no belief from man beyond what his reason authorizes. He sees the RATIONALE of the WHOLE SYSTEM, ITS ORIGIN, and ITS OPERATION; and as it is best supported WHEN BEST UNDERSTOOD, the human faculties act with *boldness,* and acquire, under this form of government, a GIGANTIC MANLINESS."

* * * * *

THE KENTUCKY FOREFATHERS FOLLOWED THE WISDOM OF OUR FEDERAL SCHOLARS.

The Kentucky Constitutional forefathers cautiously watched and guarded the "*power of debt*" of government and person.

Many instances can be cited, section by section, article by article, where they watch carefully the "power to tax" and the "power of debt limit", always leaving the "power in the hands of the people", realizing the *dangerous* propensities and effects of these forces as history has shown.

The state forefathers in the Constitutions of 1792, 1799, 1850, and 1891 provided that the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors.

Commencing with the Kentucky Constitution of 1850, and again sustained in the Constitution of 1891, even the STATE LEGISLATURE OF KENTUCKY (which represents all the people) could not exceed a debt limit of $500,000.00 WITHOUT THE VOTE OF THE FREE PEOPLE (Section 35, Ky. Const. of 1850; Section 49, the present Ky. Const. 1891).

And by Section 157, the present Kentucky Constitution, our forefathers limited the cities and towns and their agencies—not to create indebtedness beyond their annual income "*in any manner*" or for "*any purpose*", without an *election* and *vote of the people*. This "right of election", this "right to vote" became vested with the people—it is an integral part of our Kentucky Republican Form of Government. But in the instant case, *these rights* have been *destroyed* by a *legislative* "*devise*", upheld by state "*judicial abnegation.*"

What can be more fundamental in a Republic than the Right of an Election—what can be more basic than the right to vote?

POINTS AND AUTHORITIES.

The Jurisdictional Statement adequately sets forth the Acts of Congress and the United States Constitutional authority appropriate to this case, such as when the right to vote and right of election, once granted and secured by a State Constitution, has been destroyed, as is admited in the instant case.

Monroe v. *Pape*, 365 U. S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961), is cited to prove that we did not first

have to exhaust state remedies, before proceeding into the federal jurisdiction, which we did in the instant case. After the three-judge constituted Court below entered judgment in this case, a suit was filed in the state court by *Ada Parsley* v. *The City of Bowling Green,* involving the same subject matter, wherein the appellants intervened, the ruling adverse to appellants. Appellants here are entitled to the appropriate writs or remedies to be issued by the Supreme Court to enjoin the state officials from enforcing said state court judgment. *Shelley* v. *Kraemer,* 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948); *Hurd* v. *Hodge,* 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187 (1948). (See: Jurisdictional Statement, pages 13 and 14.)

The Theory of Baker v. Carr is Cited as the Analogy for the Controlling Law.

Baker v. *Carr,* 369 U. S. 186, 82 S. Ct. 691 (1962), the Tennessee reapportionment case, upheld the citizen's right to vote under the Tennessee Constitution and the U. S. Constitution (Guaranty Clause, 14th Amendment) and the Civil Rights statutes, because that right was debased by a state through "judicial abnegation" and "legislative devise or inaction."

Quoting MR. JUSTICE BRENNAN, to-wit:

> "This civil action was brought under 42 U.S.C. Sec. 1983 and 1988, 42 U. S. C. A. Sec. 1983, 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that by means of a *1901 statute of Tennessee apportioning* . . . plaintiffs and others similarly situated,

are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the *debasement* of their votes." 82 S. Ct. 694.

"This Court has frequently sustained District Court jurisdiction under 28 U.S.C. 1343 (3), 28 U.S.C.A. 1343 (3) or its predecessors to entertain suits to redress deprivations of rights secured against state infringement by the Equal Protection and Due Process Clauses of the Fourteenth Amendment (cases cited). (Footnote 19, *Baker* v. *Carr,* 82 S. Ct. 691, page 101.)

". . . *A citizen's right to a vote free of arbitrary* impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, cf. *U. S.* v. *Classic,* 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368; or by a refusal to count votes from arbitrarily selected precincts, cf. *U. S.* v. *Mosley,* 238 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355, or by a stuffing of the ballot box, cf. *Ex Parte Siebold,* 100 U. S. 371, 25 L. Ed. 717; *U. S.* v. *Saylor,* 322 U. S. 385, 64 S. Ct. 1101, 88 L. Ed. 1341." Page 705, *supra.*

"The guaranty is of a republican form of government."

"The guaranty necessarily implies a duty on the part of the States themselves to provide such a government."

"By the Constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for

governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; ***BUT, WHILE THE PEOPLE ARE THUS THE SOURCE OF POLITICAL POWER, THEIR GOVERNMENT, NATIONAL AND STATE, HAVE BEEN LIMITED BY WRITTEN CONSTITUTIONS, AND THEY HAVE THEMSELVES THEREBY SET BOUNDS TO THEIR OWN POWER,*** as against the sudden impulses of mere majorities."

(Footnote 48, pp. 712-13, *Baker* v. *Carr, supra.*)

"WHEN CHALLENGES TO STATE ACTION RESPECTING MATTERS OF ADMINISTRATION OF AFFAIRS OF A STATE AND OFFICERS THROUGH WHOM THEY ARE CONDUCTED REST ON CLAIMS OF CONSTITUTIONAL DEPRIVATION WHICH ARE AMENABLE TO JUDICIAL CORRECTION, THE *SUPREME COURT WILL ACT UPON ITS VIEW OF MERITS OF THE CLAIM.*"

(Examples cited—*Baker* v. *Carr,* 82 S. Ct. 716.)

Quoting *MR. JUSTICE DOUGLAS,* concurring in *Baker* v. *Carr:*

"*So far as voting rights are concerned, there are large gaps in the Constitution.* YET THE RIGHT TO VOTE IS INHERENT IN THE REPUBLICAN FORM OF GOVERNMENT ENVISAGED BY ARTICLE IV, SECTION 4 OF THE CONSTITUTION . . ."

". . . A 'REPUBLICAN FORM' OF GOVERNMENT IS GUARANTEED EACH STATE BY ARTICLE IV, SECTION 4 . . ."

At page 726, Vol. 82 Sup. Ct., JUSTICE DOUGLAS so well remarks,

"THERE IS NO DOUBT THAT THE FEDERAL COURTS HAVE JURISDICTION OF CONTROVERSIES *CONCERNING VOTING RIGHTS.* The Civil Rights Act gives them authority to redress the deprivation 'under color of any State law' of any 'right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . .' 28 U.S.C. Sec. 1343 (3), 28 U.S.C.A. Sec. 1343 (3). And 28 U.S.C. Sec. 1343 (4), 28 U.S.C.A. Sec.1343 (4) gives the federal courts authority to award damages or issue an injunction to redress the violation of 'any Act of Congress providing for the protection of civil rights, *including THE RIGHT TO VOTE.*' For as stated in U. S. v. Classic, 313 U. S. 299, 326 S. Ct. 1031, 85 L. Ed. 1368:

> 'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.' And see, *Monroe* v. *Pape,* 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492."

"THE RIGHT TO VOTE IN BOTH FEDERAL AND STATE ELECTIONS WAS *PROTECTED BY THE JUDICIARY LONG BEFORE THAT RIGHT RECEIVED THE EXPLICIT PROTECTION IT IS NOW ACCORDED BY Sec. 1343 (4)."* (Cases and examples cited, P. 726, Justice Douglas in Baker v. Carr.)

MR. JUSTICE DOUGLAS continued:

> "Intrusion of the Federal Government into the election machinery of the States has taken numerous forms—investigations . . . criminal proceedings . . . collection of penalties . . . suits for declaratory relief and for an injunction . . . suits by the United States under the Civil Rights Act to enjoin discriminatory practices . . ." And quoting Judge McLaughlin (P. 727):
>
> 'The whole thrust of today's legal climate IS TO END UNCONSTITUTIONAL DISCRIMINATION. IT IS LUDICROUS TO PRECLUDE JUDICIAL RELIEF WHEN A MAINSPRING OF REPRESENTATIVE GOVERNMENT IS IMPAIRED. *LEGISLATORS HAVE NO IMMUNITY FROM THE CONSTITUTION.* THE LEGISLATURES OF OUR LAND SHOULD BE MADE AS RESPONSIVE TO THE CONSTITUTION OF THE UNITED STATES AS ARE THE CITIZENS WHO ELECT THE LEGISLATORS.'"

* * * * *

ARGUMENT.

Debt is historically and presently a form of slavery. The federal forefathers mandated that each state would have a republican form of government. The Kentucky forefathers obeyed the mandate. It is just as important to vote upon debt limitation, as it is to vote for an official. The right to vote here is "vested" and untouchable unless the people consent by vote and elec-

tion, but it has been destroyed in this case and they even admit the denial.

When they did not hold an election, when they did not allow the people to vote, it was a denial of due process of law.

The State Government cannot do indirectly what it is prohibited from doing directly. It cannot come through the "back-door" when it is prohibited through the "front-door" of liberty.

They say they did not "discriminate" because, using their words, *"All were treated alike."* IT WAS *TOTAL* AND *WHOLESALE* DISCRIMINATION AGAINST THE ENTIRE BODY OF CITIZENS—every creed, every color, every class, every voter—WAS DENIED, DEBASED, DEPRIVED of his constitutional guarantee! *Their action is the complete ANNIHILATION OF SECTION 157 Kentucky Constitution*—and their legislative "devise" upheld by "judicial abnegation" is as though they had taken a pencil and by their state authority in government STRICKEN EVERY WORD FROM SECTION 157 Kentucky Constitution: *It is "government" ruling the "Constitution" and the "People", the very reverse of what we stand for in our "American Way of Life." And if these things be permitted to continue, this Nation, Gentlemen, is headed for the graveyard of history!*

Each and every argument they make fades in the broad-daylight of reason and truth.

First, they cite *Carson* v. *Sewer Com. of Brocton*, 182 U. S. 398, 21 S. Ct. 860, about municipal "rates", but we are not here concerned with "rates"; the dead

center issue here is that the RIGHT TO VOTE AND THE RIGHT OF ELECTION HAS BEEN DESTROYED!

Second, they say "We can find no provision of the Federal Constitution which requires a vote of the people in the issuance of bonds by a municipality or which provides for a vote of the people on a local issue." And we ask, Mr. Appellee a question: Can you find a provision in the Federal Constitution where the state citizenry must vote for a Governor? The answer is "No", but once that right to vote for a Governor or to vote on "local bonded indebtedness" has been granted by state constitutional guarantees, it shall be upheld always and foremost, if we are to remain a democracy!

Third, they cite an old case in 1904, *Pope* v. *Williams,* 24 S. Ct. 573, 48 L. Ed. 817, where the "guarantee" had not been granted, but in this case the right to vote and the right of election HAS BEEN GRANTED, CEMENTED, SECURED, PROTECTED IN THE KENTUCKY CONSTITUTION and now totally annihilated by state action!

Fourth, they say the United States Supreme Court is bound by the "legislative devise" and this "judicial abnegation"! They say it has been upheld for 40 years in Kentucky as "public policy"! When did "public policy" ever supersede State Constitutional Rights of the Free People? And if they be right about their fading argument that the State Decisions are binding on the U. S. Supreme Court, then if that be true, today, Arkansas, Mississippi, Louisiana, Alabama, Georgia

and Tennessee would be RULING THE FEDERAL COURTS on desegregation and reapportionment and a thousand and one things!

Fifth, they *CONFESS* to the "legislative devise" and the "judicial abnegation", which is self-evident in the very wording they use to circumvent the constitutional guarantee, to-wit:

> "K.R.S. 58.010 Definitions ('Governmental Agency' means the Commonwealth of Kentucky as such acting by or through any department, instrumentality or agency thereof, *or* any county, *city, agency or instrumentality* or other political subdivision of the Commonwealth, or agency, or instrumentality thereof."

Then say by K.R.S. 58.040,

> ". . . and that it does not constitute an *indebtedness* of the governmental agency within the meaning of the Constitution."

But Section 157 of the Kentucky Constitution so plainly replies, upholding this CONSTITUTIONAL RIGHT TO VOTE AND RIGHT OF DEBT AND RIGHT OF ELECTION BELONGING UNTO THE FREE PEOPLE, to-wit:

> ". . . *No* county, *city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted in any manner or for any purpose, to an amount exceeding the annual income,* in any year, *without the assent* of two-thirds *of the voters thereof, voting at an election*

to be held for that purpose; and any indebtedness contracted in violation of this section shall be *void.*"

By their "legislative devise" (Ch. 58) they admit that they are an instrumentality of the city and the town; they admit by definition in the *first breath* that they *squarely* come under the provisions of Section 157 Kentucky Constitution, and in the last breath, they try to close the "*gap*" *of the* "*devise*" by saying, "it does not constitute an indebtedness of the governmental agency within the meaning of the Constitution."

It is so plain, so clear—it is precise in fact that it is a "LEGISLATIVE SCHEME" and "DEVISE" to circumvent, and in turn, has destroyed the fundamental and basic rights of these people to vote upon debt limitation, as guaranteed by the people's creature: The Kentucky Constitution!

The devise severs, and disfranchises, and "takes away" the last little thread of power and influence the plain ordinary citizen has— his right to vote! Sever that right, and soon, all power of government will fade from the "hands of the people" into the hands "of the select few", the very reverse of our "way of life."

Sixth, in passing to their next flimsy point, they say that *Baker* v. *Cary* only applied to a "fractional voter"! Suppose the State Legislature of Tennessee had completely denied the citizens of "Memphis", "Knoxville", "Chattanooga" and "Nashville" of all right of election and of all right to vote, secured by the Tennessee Constitution? What then, Mr. Appellee,

would be your answer? What then would be the difference between the "fraction" and the "whole"? Mr. Jefferson gives us the answer, Sir! "What is true of every member of the society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of the individuals."

Seventh and Lastly, they do not deny that it is a debt of the government to be paid by the people. How is this debt created or declared? It is not in the name of the Citizens. It is in the name of the government or one of its instrumentalities. Who shall pay this debt? Not tourist, not "out-siders", but only the citizens and inhabitants living inside that town or that city—and they are walled in by their very existence there. They must pay the debt: (1) by criminal compulsion from $2.00 to $5.00 per day fine for failure to pay the obligation created by the government (Ordinance No. 776, Sec. 5); (2) of necessity, as they are the only source for payment; (3) and they must pay without their consent, in violation of their "liberty"—payment by force!

How are debts paid? Not with promises, not with paper, but by each citizen with hard labor and honest toil in field, factory and office! Both taxes and debts are paid this way. That is why our state forefathers said, "Those who must pay the debt, should have a voice in its creation!"

CONCLUSION.

This Great Tribunal is being flooded with cases because the state governments fail to uphold the local liberties of the free people; because they fail to comprehend the complete whole rationale of our great system and way of life.

We are the last stronghold of liberty in the World. In reapportionment, desegregation and the many other great decisions unholding the rights of the individual freedom, this Great Tribunal is rising to carry forth the Torch of Liberty for each and all—to keep it a government of the people, by the people and for the people; and not a government of the "select few" who rule! Mr. Jefferson said the secret was in making the people "the depository of the powers respecting themselves." And "placing under every one what his own eye may superintend." And we conclude with confidence, where the Kentucky forefathers left to the individual citizens the right to superintend their local debts, as a constitutional guarantee, the right now invaded, this Great Tribunal will come to the rescue of right and liberty! And then, "all will be done for the best."

Respectfully submitted.

ALBERT O. SCAFURO,
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LELAND LOGAN,
Myers Building,
Bowling Green, Kentucky,

C. L. BELL,
601 Center Building,
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JOHN WARD,
Danville, Kentucky,

MARION VANCE,
Glasgow, Kentucky,

All Attorneys and Counsellors for the Appellants.

Proof of Service.

For appellants, C. L. Bell, of counsel, certifies that on the 13th day of September 1963 he served the foregoing "Appellants' Reply and Brief to Appellees' Motion and Brief" by mailing a copy in the United States Mails, postage prepaid, to the respective appellees and counsel of record, to-wit:

(1) On the City of Bowling Green, Kentucky to the Hon. G. D. Milligan, City Solicitor and Attorney for said city and appellees, and its Mayor, Hon. Bob Graham, at Bowling Green, Kentucky;

(2) On the Water-Sewer and Sanitation Commission by copy to its members individually and its Attorney of record, Hon. Charles Reynolds, all of Bowling Green, Kentucky;

(3) Hon. Squire R. Ogden, 610 Marion E. Taylor Building, Louisville, Kentucky, Counsel for Appellees;

(4) On the Commonwealth of Kentucky by copy unto Hon. Bert Combs, Governor and Hon. John Breckinridge, Attorney General, both of Frankfort, Kentucky.

Certificate of service is made pursuant to Rule 33(3)(b), Rules of the Supreme Court of the United States.

C. L. Bell

C. L. Bell

Subscribed and sworn to before me this 13th September 1963, by C. L. Bell, of counsel for appellees, to be true and correct.

Notary Public, Jefferson Co., Ky.

(Seal)

My Comm. expires ____ day of _____, 19___.

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SUPREME COURT OF THE UNITED STATES

October Term, 1953

Docket Number 321

SINCLAIR DAVIS,
R. V. "DOC" SCHULTZ,
LOYD MARTIN FINCH, Suing Jointly, Severally and as Representatives of a Class Similarly Situated, - - - - - Appellants,

vs.

CITY OF BOWLING GREEN, KENTUCKY, a Second Class City in the Commonwealth of Kentucky,
WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky, Composed of Jack Reichel, Emery Cardwell, Fred Austin, P. P. Dumas, C. C. Coleman and Leonard Hildreth, Chairman (Sued Individually, as Official Members and as a Political Subdivision), - - - - - Appellees.

Civil Action No. 913.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, AT BOWLING GREEN, KENTUCKY.

APPELLANTS' PETITION FOR REHEARING.

ALBERT O. SCAFURO,
3 West Allendale Avenue,
Allendale, New Jersey,

LELAND LOGAN,
Hyers Building,
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C. L. BELL,
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JOHN WARD,
Danville, Kentucky,

HARRON VANCE,
Glasgow, Kentucky,

All Attorneys and Counsellors for the Appellants.

WEBSTER-ARNETT CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

October Term, 1963

Docket Number 331

SINCLAIR DAVIS,
R. V. "BOB" SCHULTZ,
LOYD MARTIN FINCH, Suing Jointly, Severally and as Representatives of a Class Similarly Situated, - - - *Appellants,*

v.

CITY OF BOWLING GREEN, KENTUCKY, a Second Class City in the Commonwealth of Kentucky,
WATER-SEWER AND SANITATION COMMISSION of Bowling Green, Kentucky, Composed of Jack Holland, Emory Cardwell, Fred Austin, P. P. Dumas, C. C. Coleman and Leonard Hildreth, Chairman (Sued Individually, as Official Members and as a Political Subdivision, - - *Appellees.*

Civil Action No. 933.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF KENTUCKY,
AT BOWLING GREEN, KENTUCKY.

PETITION FOR REHEARING.

APPELLANTS' PETITION FOR REHEARING BECAUSE:

1. The subject matter is of such importance that doubt will prevail as to the legality of municipal bonds by virtue of the lack of a written decision and opinion in the matter by the Court.

2. The subject matter is of such magnitude that it deserves oral argument and a true presentation to the Court by both sides of the case and a written explanatory opinion by this Court elaborating upon the question why the State Constitutional right to vote, once granted, then abridged, shall not be corrected.

3. The lack of explanation by this High Court, when such a right to vote has been admittedly debased; a multitude of similar suits will be filed in this case to support the reason for seeking a redress of the wrongs or the reasons therefor.

Respectfully submitted,

ALBERT O. SCAFURO,
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Allendale, New Jersey,

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601 Center Building,
Louisville, Kentucky,

LELAND LOGAN,
Myers Building,
Bowling Green, Kentucky,

JOHN WARD,
Danville, Kentucky,

MARION VANCE,
Glasgow, Kentucky,

All Attorneys and Counsellors for the Appellants.

Proof of Service.

For appellants, C. L. Bell, of counsel, certifies that on the 13th day of November 1963 he served the foregoing "Petition for Rehearing" by mailing a copy in the United States Mails, postage prepaid, to the respective appellees and counsel of record, to-wit:

(1) On the City of Bowling Green, Kentucky to the Hon. G. D. Milligan, City Solicitor and Attorney for said city and appellees, and its Mayor, Hon. Bob Graham, at Bowling Green, Kentucky;

(2) On the Water-Sewer and Sanitation Commission by copy to its members individually and its Attorney of record, Hon. Charles Reynolds, all of Bowling Green, Kentucky;

(3) Hon. Squire R. Ogden, 610 Marion E. Taylor Building, Louisville, Kentucky, Counsel for Appellees;

(4) On the Commonwealth of Kentucky by copy unto Hon. Bert Combs, Governor and Hon. John Breckinridge, Attorney General, both of Frankfort, Kentucky.

Certificate of service is made pursuant to Rule 33(3)(b), Rules of the Supreme Court of the United States.

C. L. Bell

Subscribed and sworn to before me this 13th day of November, 1963, by C. L. Bell, of counsel for appellants, to be true and correct.

Notary Public, Jefferson Co., Ky.

This is to certify that I, C. L. Bell, counsel for appellants, have presented this petition in good faith and not for delay. This the 13th day of November, 1963.

C. L. Bell,
Counsel for Appellants.

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